CORPORATE PURPOSE THROUGH A MĀORI LENS

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Corporate purpose for Māori organisations involves broader considerations than the maximisation of profit. This is consistent with tikanga and the context in which Māori organisations operate.

In this article, we set out the background to the recent amendment to s 131 of the Companies Act 1993 which explicitly permits directors to consider matters other than the maximisation of profit when considering the best interests of a company. We also consider corporate purpose through a Māori lens, before commenting on the reference to the principles of the Treaty of Waitangi | te Tiriti o Waitangi in the original Bill. Lastly, we discuss of the use of tikanga as a better framework, and how that may work in practice.

I BACKGROUND

On 1 August 2023, Parliament passed the Companies (Directors' Duties) Amendment Act 2023. The Act amended s 131 of the Companies Act 1993 (the Act), which outlines the duty of directors to act in good faith and in the best interests of a company, to insert a new subs (5). The new subs (5) states that:[1]

> To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, *environmental, social, and governance matters*).

The Bill faced significant opposition, including from Te Kāhui Ture o Aotearoa | New Zealand Law Society, the Ministry of Business, Innovation and Employment, the Legislation Design and Advisory Committee and large law firms.[2] The main concern was that case law, namely *Madsen-Ries*

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1 Emphasis added.

2 See Te Kāhui Ture o Aotearoa | New Zealand Law Society "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at [2.1];

v Cooper,[3] confirmed that the legislative test in s 131 of the Act is subjective, and so directors are already permitted to consider matters other than the maximisation of profit when considering the best interests of a company.

In its comments on the Bill, the Law Society wrote:[4]

> The Law Society is of the view this Bill should not proceed. Company directors can already consider the matters outlined in clause 4, and any attempt to reiterate or reinforce this by amending the legislation is inappropriate when done in this ad-hoc manner. This is a fundamental element of New Zealand corporate law, and as a member's bill this has not had the benefit of a thorough and comprehensive law reform process, including early public consultation. To allow the Bill to proceed risks unintended and unconsidered consequences to other aspects of New Zealand law.

Notably, the final version of the Bill, which passed into legislation, watered down the wording in the original Bill, which included a list of specific environmental, social and governance matters directors could consider.[5] One matter on the list explicitly gave directors the option to consider "recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".[6] The entire list was removed on the recommendation of the Economic Development, Science and Innovation Committee prior to the Bill's second reading.[7]

II CORPORATE PURPOSE THROUGH A MĀORI LENS

In te ao Māori, the use of a single company for collectively held assets is relatively limited. Other legal vehicles are more commonly adopted.

Ministry of Business, Innovation and Employment *Companies (Directors Duties) Amendment Bill: Departmental Report to the Economic Development, Science and Innovation Committee* (9 March 2023) at [30]–[35]; Legislation Design and Advisory Committee "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at [28]; Bell Gully "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at [3.9]; Chapman Tripp "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at 3; and Russell McVeagh "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at 1.

3 *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43 at [112].

4 New Zealand Law Society, above n 2, at [2.1].

5 Companies (Directors Duties) Amendment Bill 2021 (75-1).

6 Companies (Directors Duties) Amendment Bill (75-1), cl 4.

7 Companies (Directors Duties) Amendment Bill (75-2) (select committee report) at 2.

For example, post-settlement governance entities (PSGEs) tend to be trusts. This is driven by the Crown's "20 questions on governance" which lends itself to a trust model.[8] That being said, many PSGE structures include companies. This is often in the form of an asset holding company prescribed by the Māori Fisheries Act 2004, if the post-settlement structure is one that has received settlement under the Māori Fisheries Act. The use of companies, however, is not limited to only asset holding companies, with many PSGEs forming companies as part of their broader structure. This can be done for a range of reasons, often as the PSGE structure evolves and subsidiary companies need to be established. Examples include the establishment of companies for commercial ventures, including the establishment of limited partnerships with general partner companies, or to act as a corporate trustee as many PSGEs begin to adopt a corporate trustee structure.

However, not all collectively held assets are derived from Treaty settlements. Te Ture Whenua Māori Act 1993 prescribes a range of vehicles for collectively held Māori land and general land owned by Māori such as ahu whenua trusts, pūtea trusts, whānau trusts, whenua topu trusts, kaitiaki trusts and Māori incorporations. Te Ture Whenua Māori Act does not refer to the use of companies, other than the use of trustee companies.

Although Māori incorporations have some similar features to companies, Te Ture Whenua Māori Act does not prescribe particular duties for committee of management members. The committee of management is akin to a board of directors. Further, many Māori incorporations do not adopt a bespoke constitution, so the Māori Incorporations Constitution Regulations 1994 apply, which also do not contain prescriptive duties. This is in contrast with trustees of trusts constituted under Te Ture Whenua Māori Act, who have trustee duties under the Trusts Act 2019. Instead, Māori incorporations must rely on provisions in the Act to assist in determining how committee of management members carry out their duties. For example, Te Ture Whenua Māori Act sets out rules in relation to the alienation, or other use, of land.

In practice, corporate purpose for Māori organisations (including where companies are involved) often extends to broader considerations than the maximisation of profit, even without the inclusion of s 131(5) of the Act. We consider this is for a range of reasons, including:

(a) First, a Māori worldview stipulates that profit maximisation is not the only measure of success. Tikanga norms such as respecting and acknowledging whakapapa, and fulfilling responsibilities arising from whanaungatanga (including showing manaakitanga and exercising kaitiakitanga) are likely to be key considerations for Māori organisations, which can and will trump profit maximisation in a range of contexts. That said, profit maximisation remains an important consideration, as growing assets is necessary for future generations to act in accordance with tikanga norms.

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8 See Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua | Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018).

(b) Secondly, because collectively held assets are often a result of a Treaty settlement, the purpose for which assets are being transferred to a PSGE is not primarily for the maximisation of profits. Rather, it is to settle breaches by the Crown of the Treaty which have had a severe impact on Māori. Accordingly, some consider that settlement assets should be used to address the severe impact that breaches by the Crown have caused, and a single maximisation of profit view simply does not make sense in this context. This view is often tempered with the view that PSGEs do not replace the Crown and the Crown's continued obligations to Māori more generally. In this regard, a commonly held view is that a PSGE should not do the job of the Crown just because it has received a Treaty settlement.

(c) Thirdly, as many companies sit within a broader PSGE structure, their obligations are not limited to the company in isolation. Rather, PSGE structures will often include mechanisms that require the group to act collectively, often for the ultimate benefit of beneficiaries, or for the iwi. For a subsidiary company, this can include:

(i) having policies and plans (investment policies and strategic and annual plans) approved by the PSGE;

(ii) having bespoke major transaction clauses that require approval based on monetary thresholds that differ from the Act, or by identifying particular transactions that require special approvals, for example the disposition of culturally significant land;

(iii) robust planning, reporting and accountability provisions from subsidiary entities to the PSGE parent, and then to beneficiaries more broadly; and

(iv) particular distribution mechanisms whereby minimum dividends are payable to the PSGE.

From a very practical perspective, accountability to iwi members can be a driver for behaviour, and impact upon how directors might satisfy their obligations, both under the Act and as provided for in the various governing documents that form the PSGE structure.

Importantly, each PSGE structure will have their own unique set of standards they apply when considering corporate purpose. This is because different Māori organisations will have different assets, different settlements, different impacts they are trying to address, different aspirations, and hapū and iwi have localised expressions and application of tikanga.

In relation to representation models for PSGE structures, trustees or governors of the PSGE itself are generally elected by iwi members at large. It is the elected governors who often appoint directors or governors to subsidiary entities, often companies. Appointments are often skills-based appointments, depending on the entity and the activities (current or future) of the entity. Despite this, the purpose of subsidiary entities often extends beyond profit maximisation, even for commercial entities within a structure. PSGE structures have moved beyond the siloed approach of the 'commercial arm' focusing solely on commercial gain, instead moving towards a more holistic

approach with the growing recognition that an isolated profit maximisation approach is ineffective in achieving the broader objectives of an iwi.

III REFERENCE TO THE PRINCIPLES OF THE TREATY OF WAITANGI | TE TIRITI O WAITANGI IN THE ORIGINAL BILL

The inclusion of the option to consider "recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in the original Bill, despite being removed from the Bill which passed into legislation, is worthy of comment. We consider the inclusion of a reference to the principles of the Treaty problematic for two reasons.

First, the Act does not, on its face, engage the Māori–Crown relationship. This was noted in the Economic Development, Science and Innovation Committee's report on the original Bill, which stated that:[9]

> The reference to the principles of Te Tiriti o Waitangi could be an additional source of confusion, because the relationship between the Crown and Māori is governed by Te Tiriti, and this relationship does not typically include other individuals or private entities.

Secondly, if the Māori–Crown relationship was engaged, it would follow that consideration of the principles of the Treaty would be mandatory.

The inclusion of the reference to the principles of the Treaty in the original Bill also has broader implications. Te Arawhiti | The Office for Māori Crown Relations (as it was then known) commented:[10]

> A recent proliferation of Treaty clauses, however, has raised questions about the extent to which they are the product of well-considered policy and careful analysis of their legal and practical effect. If Parliament's intended effects of a Treaty clause are not clear there is a risk they will not be implemented, potentially leading to unintended or adverse consequences both in the portfolio area and for the Māori Crown relationship.

In our view, particular care needs to be taken when considering including a reference to the Treaty principles in proposed legislation, including in members' bills. Although references to the Treaty principles should always be made in appropriate contexts, where references are made in contexts that do not actually engage the Māori–Crown relationship, there are consequences. Not only are such clauses confusing and difficult to interpret, they dilute the significance of references to the Treaty principles that *are* in appropriate contexts. In our view, while potentially well-meaning, they also

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9 Select committee report, above n 7, at 2.

10 Te Arawhiti | The Office for Māori Crown Relations *Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design* (March 2022) at [9].

amount to little more than window-dressing, which may negatively impact the Māori–Crown relationship.

We suggest that if the Act was to adopt an approach whereby a Māori lens can be applied to corporate purpose, a more appropriate starting point than the Treaty would have been tikanga. Explicitly permitting directors to consider tikanga when considering the best interests of a company would empower directors to apply a Māori lens in their decision-making, and align better with the context in which Māori organisations operate.

IV HOW MIGHT IT WORK IN PRACTICE?

Tikanga has been defined in the following way by Williams J:[11]

> … "tika" meaning correct, right or just; and the suffix "nga" transforming "tika" into a noun, thus denoting the system by which correctness, rightness or justice is maintained.

And by Benton, Frame and Meredith as follows:[12]

> *Tika* has an outer or surface meaning of 'straight, direct, keeping a direct course', tied in with the moral connotations of justice and fairness, including notions such as 'right, correct'.

Further, Mead has described tikanga as embodying:[13]

> … a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do. Many of the tikanga have been given specific names and some of them, such as the tangihanga ceremony for example, is a complex of several tikanga which are inter-related and underpinned by a body of philosophy (or Matauranga Maori) and a set of beliefs.

Some practical examples of how directors might apply their duties by taking a tikanga-based approach in different contexts, with reference to the factors set out in the original Bill, are set out below.

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11 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 2.

12 Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 429.

13 Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai I te Ata Hāpara Conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) at 3–4.

A Taiao Considerations

One of the factors listed in the original Bill was "reducing adverse environmental impacts".[14] Some may consider this wholly inadequate in describing the kaitiaki obligations of Māori to the taiao, which is a central to the Māori worldview. Kaitiakitanga has been described as the obligation to care for one's own or as stewardship and protection, often used in relation to natural resources.[15]

Adopting a tikanga-based approach would allow directors to apply tikanga in the right context, and in the right way, depending on the nature of the decision to be made. Taiao considerations are far-reaching, but some obvious examples include decisions around the use of land and/or the moana: for example, infrastructure projects, resource consent applications for water take for horticulture and/or other projects, aquaculture projects, farming and forestry. Further, it will be important to consider whether the entity itself is seeking to undertake the project, whether the entity is partnering with others for the project and/or whether an entity is considering opposition to such projects. In all circumstances, a tikanga-based approach, balanced with profit maximisation and other non-financial benefits that might flow, could be applied.

B The Importance of Procurement, Employment and Training Opportunities

One of the factors listed in the original Bill was "following fair and equitable employment practices".[16] Many PSGE structures actively consider how to increase procurement, employment and training opportunities for their ultimate beneficiaries, ie iwi members. Often policies imposed at the PSGE level will require subsidiary companies, or other entities within the group structure, to take these matters into account. Procurement, employment and training opportunities can at times be at odds with a traditional profit maximisation approach. Directors of companies within te ao Māori should be able to balance these considerations when making decisions, should the context require, without being at risk of breaching director duties.

C The Importance of the Marae

Many PSGE structures rightly recognise the importance of the marae:[17]

> A marae is an institution that is a vital part of Māori culture. It consists of a space that is defined and has a name. It is usually fenced in and is a significant site for carrying out the ceremonies and cultural practices of the owning group. There are buildings on the site, one of which is usually a whare tipuna, or ancestral

14 Companies (Directors Duties) Amendment Bill (75-1), cl 4.

15 Benton, Frame and Meredith, above n 12, at 105.

16 Companies (Directors Duties) Amendment Bill (75-1), cl 4.

17 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 102.

> house, which also has a name. It is usually the name of a well-known ancestor or it might be a name commemorating some important event. The names are very important. The ancestral name is a uniting force as most of the people associated with the marae can trace a genealogical line to the ancestor. So it is their ancestor and their house and their land.

Some may question how the importance of the marae impacts upon the corporate purpose for a company, but for companies operating in te ao Māori, particularly those that form part of collectively held structures, it should be an important consideration. Practically, the importance of the marae often does (and should) colour how duties are performed both in relation to funding and resourcing decisions, but also how decisions are made and how ahi kaa are consulted with, and contribute to, decision making. The number of marae vary greatly across different iwi, with some having only one marae, and others having upwards of 50.

D The Retention of Land

The retention of land is often paramount for Māori entities. This may at times be at direct odds with profit maximisation, particularly if the retention of land, or the purchase of land that becomes available, does not stack up commercially. The importance of the retention of land is set out in the preamble to Te Ture Whenua Māori Act:

> Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

Although the preamble is unlikely to apply to companies other than trustee companies, it is an important consideration for operating in te ao Māori, particularly those that form part of collectively held structures.

V A MANDATORY APPROACH?

A recent Māori Land Court decision confirmed that trustees of trusts constituted under Te Ture Whenua Māori Act have a duty to consider and apply tikanga, in addition to their ordinary trustee duties under the Trusts Act.[18] The same decision was also notably the first bilingual judgment in both

18 *Pokere v Bodger – Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210).

te reo Māori and English and also one of the first cases to appoint a pūkenga (or expert) to assist the Court.[19]

The judgment noted that:[20]

> In relation to trusts, this Court has all of the same powers of the High Court per s 237 of the Act, including reference to the Trusts Act 2019 and the High Court's inherent jurisdiction. This fact, coupled with the scheme of the Act, provides arguably, the clearest statutory context for tikanga to inform, influence, and dictate the duties of trustees for those trusts within our jurisdiction.

Further, it stated that:[21]

> This Court does not have the struggle of finding ways to fit tikanga recognition into the statutory rubric, even if the reference to it is not explicit in the Act or in the terms of trust. For the reasons outlined, there is a strong case for tikanga to play a role in defining the nature and extent of a trustee's duties, and for those duties to be justiciable in our Court.

The same approach may not have been taken, at least by the Māori Land Court, in relation to a company incorporated under the Act, as there may be jurisdictional issues (depending on the facts), but also because of the distinction as to how trustee duties apply versus how director duties apply. One might argue that for collectively held Māori companies, a tikanga-based approach should be mandatory. A tikanga-based approach goes well beyond profit maximisation.

VI PRIVATELY HELD MĀORI COMPANIES

This article has focused on entities that hold and manage collectively owned assets, predominantly from Treaty settlements. There are of course other entities that hold assets collectively on behalf of Māori, and the same considerations apply. Directors of companies, privately owned by Māori outside of these structures, may also want to apply tikanga in an appropriate way. The application of tikanga may be done differently because of the private ownership of the company, but tikanga remains relevant. Such application may practically occur through the agreement of such terms through shareholder agreements and constitutions.

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19 Per Te Ture Whenua Māori Act 1993, s 32A.

20 *Pokere v Bodger*, above n 18, at [91].

21 At [92].